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No. 02-722

IN THE
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HENRY W. LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1] Counsel for petitioners and respondent consented to the filing of this brief.

[1] Counsel for the Government of Switzerland prepared this brief in its entirety, and no person or entity other than the Government of Switzerland and its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE AMICUS CURIAE

The issue of payments by corporations to resolve outstanding World War II era claims has become prominent in recent years, arising simultaneously with major reevaluations by many countries of the conduct of their governments, industries, and general populations during the World War II era. The role of civil actions in the United States courts in this process has itself been highly controversial.

Switzerland was the first country to deal in a comprehensive manner with the issue of corporate payments to resolve World War II era claims. On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization. The settlement agreement, which includes payment to the plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurance companies. Meanwhile, the Government of Switzerland has endorsed the work of the International Commission on Holocaust Era Insurance Claims, an international organization formed to address unpaid insurance claims.

The Government of Switzerland has grave concerns that the decision of the U.S. Court of Appeals for the Ninth Circuit, by encouraging the State of California and other States to pursue their own unilateral agendas, may undermine the very considerable efforts that have been made by Swiss industry, major Jewish organizations, and the Swiss and United States governments to achieve a comprehensive resolution of a difficult and complex international issue. In addition, the Government of Switzerland has a vital interest in the preservation of the integrity of the laws and legal system of Switzerland, and believes that the decision of the Ninth Circuit must be reversed to prevent the California statute from

requiring the production of confidential information from Switzerland in a manner inconsistent with Swiss law and sovereignty.

Accordingly, the Government of Switzerland submits this brief to explain its views on why the California statute, if applied, will interfere with Swiss-United States relations.

SUMMARY OF ARGUMENT

The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13900-13807, is a California statute that would impose onerous reporting burdens on foreign companies, including Swiss companies, relating to records of World War II era transactions that took place over fifty years ago in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions. The purpose of the statute is to facilitate the initiation of civil lawsuits in California against foreign companies.

On February 7, 2001, the U.S. Court of Appeals for the Ninth Circuit reversed the holdings of the U.S. District Court for the Eastern District of California and held that the HVIRA is consistent with the Foreign Commerce Clause and does not infringe upon the foreign affairs power of the Executive Branch. On remand, the district court issued a permanent injunction enjoining enforcement of the HRIVA on the grounds that mandating license suspension for non-performance of impossible tasks deprived the petitioners of a protected property interest without due process of law. On July 15, 2002, the Ninth Circuit again reversed the district court, distinguished the decision of the U.S. Court of Appeals for the Eleventh Circuit on a similar statute in *Gerling Global Rein. Corp. v. Gallagher*, and upheld the HRIVA against the petitioners' constitutional claims.

Contrary to the Ninth Circuit's holdings, the HVIRA, if applied, will have a significant effect on the foreign relations of the United States with Switzerland. The HVIRA is

inconsistent with the August 9, 2000 settlement of class action claims against Swiss interests in the U.S. District Court for the Eastern District of New York, as well as with a joint Swiss-United States undertaking on Holocaust-related claims. In addition, by requiring Swiss companies to provide confidential information from Switzerland, the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws. Finally, the Ninth Circuit's decision conflicts with rulings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits.

These factors demonstrate that this case is deserving of immediate consideration by this Court.

ARGUMENT

A. The HVIRA Is Inconsistent With a Pre-Existing Settlement Agreement Between Swiss Industry, Class Action Plaintiffs, and the World Jewish Restitution Organization That Is Supported by the Swiss and United States Governments

On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization regarding World War II era claims. *In re: Holocaust Victims Assets Litigation*, 96 Civ. 4849, 2000 U.S. Dist. Lexis 15644 (E.D.N.Y. Aug. 9, 2000). The settlement agreement, which includes payment to the class action plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the express exception of three Swiss insurers.[2]

The Swiss and United States federal governments have formed a Joint Economic Commission ("JEC"), comprised of

[2] The three exempted insurers are Basler Lebensversicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs-Gesellschaft.

senior representatives of the two governments. In a Joint Statement issued through the JEC on January 29, 2000, the Swiss and United States governments reaffirmed their determination to maintain open markets and to promote bilateral market access for trade, finance and investment, including the insurance industry. With regard to Holocaust-related matters, the JEC commended Switzerland's ongoing efforts and specifically:

> welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy . . . and for the Swiss government.

ER 2384-85.[3]

The application of the HVIRA to Swiss companies (other than the three specifically exempted from the settlement) would interfere with the settlement agreement's release of the Swiss economy and would be inconsistent with Swiss and United States government policy supporting that settlement.

B. The HVIRA Conflicts With a Joint Endorsement of the International Commission on Holocaust Era Insurance Claims by the Swiss and United States Governments

The JEC's January 29, 2000 Joint Statement specifically addressed the issue of insurance claims by stating that the two governments:

> further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ... on unpaid policies of European insurance

[3] Citations to "ER" refer to the Excerpts of Record in the appeal of the preliminary injunction to the Ninth Circuit.

> companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement.

ER 2385.

In the Action Plan annexed to the Joint Statement, the United States Government pledged to "call on State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." ER 2390.

The JEC Joint Statement and the associated United States Government assurances are of great importance to Switzerland and Swiss industry, and accordingly the Government of Switzerland has expressed concern to the United States Government and the United States courts about the HVIRA on a number of occasions. For example, on April 6, 2000, the Government of Switzerland presented to the United States Government an Aide-Mémoire expressing its opinion that state laws such as the HVIRA would violate Swiss sovereignty and international law. App., *infra*, A-1. On June 2, 2000, the Government of Switzerland sent its views on the HVIRA directly to the district court. ER 2375. On August 9, 2000, the Government of Switzerland presented a diplomatic note to the United States Government regarding this case, in which it requested that the United States Government submit a brief as *amicus curiae* to the Ninth Circuit re-affirming the view that State legislative bodies should refrain from threatening or imposing sanctions against Swiss insurers. App., *infra*, B-1. The Government of Switzerland later submitted a brief as *amicus curiae* to the Ninth Circuit in support of the Petitioners' request for a rehearing *en banc* before the case was remanded to the district court.

The Government of Switzerland is particularly concerned that actions taken by the State of California under

the HVIRA will jeopardize the work of the International Commission on Holocaust Era Insurance Claims, which was formed to address issues of unpaid World War II era insurance claims. In the view of the Government of Switzerland, that commission is the most effective and expeditious vehicle for resolving unreceived and as yet unsettled insurance claims from the World War II era that are not already covered by the settlement agreement discussed above.

C. The HVIRA Would Require Swiss Companies to Violate Swiss Law

California lacks jurisdiction, as that concept is commonly understood in international law, to regulate foreign companies with respect to transactions that took place in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions.[4] In the absence of a genuine connection between the issues involved and United States jurisdiction, the enforcement of the HVIRA against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in conflicting requirements imposed on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss privacy laws, resulting in interference with the Swiss legal system.[5]

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[4] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987) § 403 ("a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing to foreign governments confidential business information relating to third parties, unless certain procedures are followed within Switzerland that ensure that the rights of third parties are appropriately protected. The California statute does not allow for the application of this Swiss law.

In the view of the Government of Switzerland, the HVIRA bears no genuine relation to the regulation of the provision of insurance services in California, but rather is designed to demonstrate that the state of California disapproves of the international cooperative actions taken to facilitate resolution of Holocaust era claims. Especially under these circumstances, the HVIRA's extraterritorial reach cannot be justified.

D. The Ninth Circuit's Decision Conflicts with Holdings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits

The Ninth Circuit's decision is inconsistent with holdings of this Court and other Courts of Appeals on the Commerce Clause, the foreign affairs powers of the Executive Branch and the requirements of due process.

In its initial ruling, the Ninth Circuit made the following comment on the January 29, 2000 Joint Statement of the JEC:

> But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers, Congress' action controls in this instance. . . . [A]s noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.

Petition for Certiorari App. 54a-55a (footnotes omitted).

There is no dispute that Congress has the authority to regulate foreign commerce, but Congress has not enacted any statute that preempts or otherwise restricts the ability of the Executive Branch to engage in negotiations with Switzerland or other foreign countries regarding resolution of Holocaust-related claims. The interpretation by the Ninth Circuit seems

to suggest that, absent the implementation of a formal treaty, the Executive Branch lacks any foreign affairs power worthy of respect by the courts. Such a restrictive interpretation of the foreign affairs authority of the Executive Branch, if allowed to stand, would have significant consequences for the ability of the federal government to interact with foreign nations.

Although the Ninth Circuit recognized that the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), held that a state may not intrude on the federal government's foreign affairs power, it declined to apply that decision. The Ninth Circuit's ruling also is inconsistent with the recent holding of the U.S. Court of Appeals for the First Circuit on the foreign affairs power in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-59 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 120 S. Ct. 2228 (2000).

Finally, the Ninth Circuit's ruling conflicts with the Eleventh Circuit's decision in *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated Florida's Holocaust Victims Insurance Act. Like the HRIVA, the Florida statute imposed reporting requirements on the Florida affiliates of European insurers that issued policies during the Holocaust to assist in the collection of World War II era claims. The Eleventh Circuit held that the Florida statute violated due process limits on Florida's legislative jurisdiction. Notwithstanding the Ninth Circuit's attempt to distinguish *Gallagher*, the identical facts and issues presented in these two cases – and their divergent results – further demonstrate the need for clarification of the law.

In the view of the Government of Switzerland, the totality of the circumstances plainly demonstrates the necessity for this Court to review and reverse the ruling below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

AIDE MÉMOIRE

Several US States - inter alia Florida, California and Washington State - have enacted special legislation in the context of unrecovered insurance policies dating from the World War II period. These pieces of legislation require insurance companies doing business in the States concerned to provide comprehensive information on individual insurance policies under the threat of severe penalties, including the suspension of the companies' business license. Considering the clearly extraterritorial scope of these laws, their enforcement against insurance companies headquartered in Switzerland can be considered a violation of international law and Swiss sovereignty, which is liable to result in conflicting requirements imposed on the companies concerned to the extent that full compliance with the special State legislation would most likely imply a violation of applicable Swiss penal and data protection laws.

The Swiss Government is concerned about this situation and the renewed threat of sanctions and administrative harassment in a number of US States against European insurance companies, including Swiss companies. It considers that such threats or the actual use of sanctions, on the basis of potentially discriminatory and otherwise legally contestable State legislations, is in contradiction with the spirit of cooperation that the Swiss and US governments have reaffirmed at Davos and could strain the bilateral relations between Switzerland and the United States. Moreover, such threats or sanctions are completely unjustified as well as counter-productive in the light of the Swiss Settlement Agreement as well as the cooperative attitude of the Swiss insurance companies concerned.

The Swiss Government holds the view that this issue needs to be promptly addressed by the U.S. Government.

APPENDIX B

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the United States Department of State and has the honor of requesting its assistance in relation to the case of Winterthur International America Insurance Company, et al. v. Chuck Quackenbush, Insurance Commissioner for the State of California (Case No. CIV. S-00-779 [JFM]), in which the California Holocaust Victim Insurance Relief Act (the "California HVIRA") is being challenged by several insurers that do business in the State of California.

The California HVIRA purports to impose obligations on Swiss and other foreign companies "related" to U.S. companies, notwithstanding the fact that those companies are not engaged in business in California or indeed in the United States. It is the understanding of the Government of Switzerland that if the related Swiss companies do not comply with the directives of the California Insurance Commissioner under the HVIRA, their U.S. affiliated companies could be sanctioned and lose their licenses to conduct business in California.

Because of the extraterritorial scope of this legislation and the absence of a genuine connection between the issues involved and U.S. jurisdiction, its enforcement against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in the imposition of conflicting requirements on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss penal and data protection

laws. The Government of Switzerland is concerned about potential attempts to interfere with the Swiss legal system.

The Government of Switzerland is also concerned that enforcement of this legislation would interfere with the Class Action Settlement Agreement reached in In Re Holocaust Victim Assets Litigation ("Swiss Settlement"). The Swiss Settlement by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurers which are involved in separate lawsuits. The California HVIRA conflicts with the Swiss Settlement's release of all other Swiss insurance companies and therefore is inconsistent with United States and Swiss government policies supporting the Settlement.

In addition, the issues referred to in the California HVIRA have been specifically addressed in the framework of the Joint Economic Commission ("JEC") recently established by our governments. A Joint Statement issued on the occasion of the inaugural meeting of the JEC specifically "welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . , when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy [including the banking, insurance and manufacturing sectors] . . . and for the Swiss government." The JEC "further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ("Eagleburger Commission") on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement." The JEC stated that it would "address issues related to potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including

those that are part of the Swiss settlement or that are participants in the Eagleburger Commission."

In the Action Plan annexed to the Joint Statement, the U.S. Government pledged to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

The Government of Switzerland has on several recent occasions expressed concern to the U.S. Government about State actions related to Holocaust insurance issues. Most recently, on April 6, 2000, the Government of Switzerland presented to the U.S. Government an Aide-Mémoire requesting prompt attention to this issue and expressing concern that such laws as the California HVIRA violate Swiss sovereignty and international law and may cause involved Swiss insurance companies to violate Swiss laws. The Government of Switzerland further objected to laws such as the California HVIRA on the grounds that they are potentially discriminatory against Swiss financial industries and a potential cause of strain on relations between the two countries. The Aide-Mémoire pointed out that laws such as the California HVIRA are counter-productive in light of the efforts and cooperative attitude of Swiss insurance companies in this matter.

Consistent with our understanding of the Department of State's policy of encouraging foreign governments to communicate directly with the United States Courts, the Government of Switzerland attempted to submit its views on this matter in a letter dated June 2, 2000 to the federal district court in which the case is being heard. The Embassy of Switzerland has learned, however, that on July 31, 2000, the court stated that it would not accept submission of the letter for procedural reasons. The Embassy therefore requests that the Department of State forward a copy of this note to the court on its behalf.

The Government of Switzerland is informed that a preliminary decision of the district court imposing a preliminary injunction against enforcement of the California HVIRA is currently pending before the Court of Appeals for the Ninth Circuit. The Government of Switzerland hereby requests that the United States Government make a submssion to the Court of Appeals, re-affirming the position of the Joint Economic Commission that the International Commission on Holocaust Era Insurance Claims is the appropriate forum for resolving remaining pertinent issues and that State authorities should refrain from taking unwarranted investigative initiatives or from threatening or imposing sanctions against Swiss insurers that would be liable to cause serious, irreparable damage to the companies concerned.

The Embassy of Switzerland avails itself of this opportunity to thank the United States Department of State for its cooperation and to renew the assurances of its highest consideration.

Washington, D.C., August 9, 2000

United States Department of State
Washington, D.C.